United Nations S/2016/716

Security Council

Distr.: General
16 August 2016

Original: English

Letter dated 15 August 2016 from the Secretary-General addressed to the President of the Security Council

In accordance with article 17, paragraph 3, of the Relationship Agreement between the United Nations and the International Criminal Court, I have the honour to transmit herewith a letter from the President of the Court, Judge Silvia Fernández de Gurmendi, dated 13 July 2016 (see annex). The President transmits therewith the decision on the non-compliance by Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the Security Council and the Assembly of States Parties to the Rome Statute, issued by Pre-Trial Chamber II of the Court on 11 July 2016 in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir*.

I should be grateful if you would bring the present letter and its annex to the attention of the members of the Security Council.

(*Signed*) **BAN** Ki-moon

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Annex

Letter dated 13 July 2016 from the President of the International Criminal Court addressed to the Secretary-General

[Original: English and French]

13 July 2016

Excellency,

Pursuant to article 17(3) of the Relationship Agreement between the United Nations and the International Criminal Court and in accordance with article 87(7) of the Rome Statute and regulation 109(4) of the Regulations of the Court, and as requested by Pre-Trial Chamber II, I hereby transmit the decision on the non-compliance by Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the Security Council and the Assembly of States Parties to the Rome Statute, in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir* of the said Chamber, dated 11 July 2016 (see enclosure).

I would be grateful if you could transmit the present letter and the enclosed decision to the Security Council.

(*Signed*) Silvia **Fernández de Gurmendi**

Enclosure

[Original: English]

Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-02/05-01/09**
Date: **11 July 2016**

PRE-TRIAL CHAMBER II

Before: **Judge Cuno Tarfusser, Presiding Judge**
Judge Marc Perrin de Brichambaut
Judge Chang-ho Chung

SITUATION IN DARFUR, SUDAN

IN THE CASE OF

THE PROSECUTOR v. OMAR HASSAN AHMAD AL BASHIR

Public Document

Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Fatou Bensouda
James Stewart

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representatives
Competent authorities of the Republic of Djibouti

Others
Presidency

REGISTRY

Registrar
Herman von Hebel

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Pre-Trial Chamber II (the "Chamber") of the International Criminal Court (the "Court"), acting under article 87(7) of the Rome Statute (the "Statute"), issues this finding of non-compliance by the Republic of Djibouti ("Djibouti") with the request for arrest and surrender of Omar Hassan Ahmad Al-Bashir ("Omar Al-Bashir") to the Court and decision referring the matter to the United Nations Security Council (the "Security Council") and the Assembly of the State Parties to the Rome Statute (the "ASP").

I. Background

1. On 31 March 2005, the Security Council, acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1593(2005), whereby it referred the situation in Darfur, Sudan, since 1 July 2002 to the Prosecutor of the Court and decided, *inter alia*, "that the Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution".[1]

2. Acting upon this referral, the Prosecutor requested a warrant of arrest against Omar Al-Bashir for war crimes, crimes against humanity and genocide committed in Darfur, Sudan.[2] Two warrants for the arrest of Omar Al-Bashir were subsequently issued by Pre-Trial Chamber I, the first on 4 March 2009 for a number of war crimes and crimes against humanity[3] and the second on 12 July 2010 for the crime of genocide.[4] To date, these warrants of arrest remain to be executed.

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[1] S/RES/1593 (2005).

[2] A public redacted version of the Prosecutor's application for a warrant of arrest is available at ICC-02/05-157-AnxA.

[3] Pre-Trial Chamber I, "Warrant of Arrest for Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-1

[4] Pre-Trial Chamber I, "Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir", ICC-02/05-01/09-95.

3. As a State Party to the Rome Statute, Djibouti was notified of the request for arrest and surrender of Omar Al-Bashir to the Court on 30 September 2010.[5]

4. On 10 May 2016, the Registrar informed the Chamber that, according to media reports, Omar Al-Bashir had travelled to Djibouti on 8 May 2016 in order to attend the inauguration of President Ismail Omer Gaili.[6]

5. Upon receipt of this information, the Chamber, on 17 May 2016, issued a decision whereby it noted that: (i) in case of non-compliance with obligations to cooperate with the Court, one of the tools available to the Court pursuant to article 87(7) of the Statute is to make a finding of non-cooperation by the State and refer the matter to the ASP or, where the situation had been referred to the Court by the Security Council, to the Security Council; and (ii) prior to any such step being taken, regulation 109 of the Regulations of the Court mandates that "the Chamber shall hear from the requested State".[7] The Chamber therefore invited Djibouti to provide its observations in accordance with regulation 109 of the Regulations of the Court in order for the Chamber to determine the course of action in relation to Djibouti's non-compliance with its obligation to arrest and surrender to the Court Omar Al-Bashir, including on whether resort to the measures under article 87(7) of the Statute would be warranted in the present circumstances.[8]

6. On 24 June 2016, the Chamber received from the Registrar a note verbale by Djibouti dated 8 June 2016 providing submissions on Djibouti's failure to arrest and surrender Omar Al-Bashir to the Court.[9] In essence, Djibouti

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[5] See ICC-02/05-01/09-127-Conf-Exp-Anx2 and ICC-02/05-01/09-127-Conf-Exp, para. 2.
[6] ICC-02/05-01/09-259-Conf-Exp.
[7] "Decision requesting the Republic of Djibouti to provide submissions on its failure to arrest and surrender Omar Al-Bashir to the Court", 17 May 2016, ICC-02/05-01/09-261.
[8] *Ibid.*
[9] ICC-02/05-01/09-264-Conf-Exp-Anx2.

submits that: (i) it lacks the national procedures required under Part 9 of the Statute for the arrest and surrender of suspects to the Court, including Omar Al-Bashir;[10] (ii) article 98(1) of the Statute precludes the arrest and surrender to the Court of Omar Al-Bashir since he is entitled to immunity as a serving Head of State;[11] (iii) Djibouti, as a member of the African Union, must respect the decision of the African Union directing its member states, in accordance with article 98 of the Statute, not to cooperate with the Court's request for arrest and surrender of Omar Al-Bashir to the Court;[12] and (iv) within the context of the Intergovernmental Authority on Development (IGAD), Djibouti is part of the peace process in the Republic of the Sudan and the Republic of South Sudan.[13]

II. Analysis

7. Pursuant to article 87(7) of the Statute, in case of non-compliance by a State Party with a request to cooperate with the Court contrary to the provisions of the Statute, one of the measures available to the Court is to make a finding of non-compliance by the State and refer the matter to the ASP and/or the Security Council when the latter referred the matter to the Court.

8. Djibouti is a State Party to the Statute. It has an obligation to cooperate with the Court in accordance with Part 9 of the Statute, including with requests for arrest and surrender to the Court of persons against whom a warrant of arrest has been issued by the Pre-Trial Chamber under article 58 of the Statute. As a State Party, Djibouti, pursuant to article 97 of the Statute, has also the obligation, in case of any problem which in its view may impede or prevent the execution of a request for cooperation by the Court, to consult with the Court without delay in order to resolve the matter.

[10] *Ibid.*, page 2.
[11] *Ibid.*, pages 2-3.
[12] *Ibid.*, page 3.
[13] *Ibid.*

9. In the present case, and notwithstanding its obligations to cooperate with the Court, Djibouti did not arrest Omar Al-Bashir while he was present on its territory and surrender him to the Court nor did it raise with the Court any problem it might have identified in the execution of such request.

10. At first, the Chamber notes Djibouti's argument that it lacks a procedure under its national law to comply with requests for arrest and surrender of suspects to the Court. To this purpose, Djibouti makes reference to article 88 and the last sentence of article 89(1) of the Statute.[14] However, these provisions do not make cooperation with the Court contingent on a State Party choosing to put in place the related national procedures, but mandate, respectively, that "States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under [Part 9 of the Statute]" and that "States Parties shall, in accordance with the provision of [Part 9 of the Statute] and the procedure under their national law, comply with requests for arrest and surrender". Therefore, absence of relevant national legislation cannot serve as a justification not to comply with requests for cooperation by the Court under Part 9 of the Statute.

11. As concerns the issue of Omar Al-Bashir's purported immunity within the meaning of article 98 of the Statute and the related decision by the African Union directing its members not to comply with the Court's request for the arrest and surrender of Omar Al-Bashir, the Chamber recalls that, already on 9 April 2014, it stated in this regard:

> [B]y issuing Resolution 1593(2005) the [Security Council] decided that the "Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution". Since immunities attached to Omar Al Bashir are a procedural bar from prosecution before the Court, the cooperation envisaged in said resolution

[14] ICC-02/05-01/09-264-Conf-Exp, page 2.

> was meant to eliminate any impediment to the proceedings before the Court, including the lifting of immunities. Any other interpretation would render the [Security Council] decision requiring that Sudan "cooperate fully" and "provide any necessary assistance to the Court" senseless. Accordingly, the "cooperation of that third State [Sudan] for the waiver of the immunity", as required under the last sentence of article 98(1) of the Statute, was already ensured by the language used in paragraph 2 of [Security Council] Resolution 1593(2005). By virtue of said paragraph, the [Security Council] implicitly waived the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State.[15]

12. In this sense, the Chamber clarified that "there also exists no impediment at the horizontal level" between a State Party to the Statute and the Republic of the Sudan regarding the arrest and surrender to the Court of Omar Al-Bashir.[16] Moreover, the Chamber stressed that since the Security Council, acting under Chapter VII of the United Nations Charter, had effectively lifted the immunities of Omar Al-Bashir in Resolution 1593(2005), a State Party to the Statute could not invoke any other decision, including that of the African Union directed to its member states, providing for any obligation to the contrary.[17]

13. The same considerations apply squarely to Djibouti and its submissions that it did not arrest and surrender Omar Al-Bashir to the Court because of his purported immunity as a serving Head of State and the related decisions by the African Union.[18]

14. Djibouti also submits, as an explanation for not having arrested Omar Al-Bashir and surrendered him to the Court while on its territory, that it is *"attaché au processus de paix de l'IGAD au Soudan et au Soudan du Sud"*.[19] In this regard, the Chamber, while sensitive to these political considerations, stresses

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[15] "Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court", 9 April 2014, ICC-02/05-01/09-195, para. 29 (footnotes omitted).
[16] *Ibid.*
[17] *Ibid.*, para. 31.
[18] ICC-02/05-01/09-264-Conf-Exp, pages 2-3.
[19] *Ibid.*, page 3.

that State Parties to the Statute must pursue any legitimate, or even desirable, political objectives within the boundaries of their legal obligations vis-à-vis the Court. Indeed, it is not in the nature of legal obligations that they can be put aside or qualified for political expediency.

15. Finally, the Chamber observes that already in May 2011, after the two warrants of arrest against Omar Al-Bashir had been issued by the Court, Djibouti failed to arrest and surrender Omar Al-Bashir to the Court while on its territory. As a result of this, Pre-Trial Chamber I, on 12 May 2011, made a finding of non-cooperation by Djibouti and referred the matter to the Assembly of States Parties to the Statute and the Security Council.[20]

16. Given that Djibouti's explanation as to its failure to arrest and surrender Omar Al-Bashir to the Court is limited to the aspects addressed above, that the non-compliance by Djibouti prevents the Court from exercising its functions and powers under the Statute within the meaning of article 87(7), and that the present one constitutes yet another instance in which Djibouti has failed to abide by his obligation to cooperate with the Court, the Chamber is of the view that it is appropriate to make a further finding of non-compliance by Djibouti with the Court's request for cooperation and refer the matter to the ASP and the Security Council under article 87(7) of the Statute.

17. In this context, the Chamber reiterates once again[21] that, unlike domestic courts, the Court has no direct enforcement mechanism and must rely on

[20] Pre-Trial Chamber I, "Decision informing the United Nations Security Council and the Assembly of States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti", 12 May 2011, ICC-02/05-01/09-129.

[21] See also "Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir", 27 March 2013, ICC-02/05-01/09-151, para. 22; "Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court", 9 April 2014, ICC-02/05-01/09-195, para. 33; "Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of Sudan", 9 March 2015, ICC-02/05-01/09-227, para. 17.

cooperation by the States in order to fulfil its mandate. It is therefore of particular importance that the Security Council, after referring a situation to the Prosecutor of the Court as constituting a threat to international peace and security,[22] responds with any appropriate measure to the failure on the part of States Parties to the Statute to cooperate with the Court in order for it to fulfil the mandate with which it has been entrusted. In the absence of follow-up actions on the part of the Security Council any referral to the Court under Chapter VII of Charter of the United Nations would become futile and incapable of achieving its ultimate goal of putting an end to impunity. Similar considerations demand that appropriate follow-up actions in response to the non-compliance by a State Party to the Statute with requests for cooperation by the Court be taken by the ASP with a view to ensuring that the Court is able to exercise fully its functions and powers under the Statute.

18. Regulation 109(4) of the Regulations of the Court stipulates that, in case a finding has been made under article 87(7) of the Statute, it is the President of the Court that refers the matter to the ASP and/or the Security Council. The present decision is therefore notified to the President in order for it to be transmitted to the ASP and, through the Secretary-General of the United Nations, to the Security Council.

[22] Resolution 1593(2005).

FOR THESE REASONS, THE CHAMBER

FINDS, pursuant to article 87(7) of the Statute, that the Republic of Djibouti has failed to comply with the request for arrest and surrender of Omar Al-Bashir to the Court, thereby preventing the Court from exercising its functions and powers under the Statute; and

DECIDES that the matter of Djibouti's non-compliance with the request for arrest and surrender of Omar Al-Bashir to the Court be referred, through the President of the Court in accordance with regulations 109(4) of the Regulations of the Court, to the Assembly of States Parties to the Rome Statute and the United Nations Security Council.

Done in both English and French, the English version being authoritative.

Judge Cuno Tarfusser
Presiding Judge

Judge Marc Perrin de Brichambaut

Judge Chang-ho Chung

Dated this 11 July 2016
At The Hague, The Netherlands

Cour Pénale Internationale
International Criminal Court

Name: Nuria Velils
Certifies Document
No: ICC-02/05-01/09-266
Title: Decision on the non-compliance by the
On: Republic of Djibouti with the request to arrest an[illegible] surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of States Parties to the Rome Statute
14/07/2016 The Hague